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agreed to convey to R. the residue of the lot on which the other three houses were erected at the price of \$6,300, and in addition to pay him \$2,420. In order to assist R. in performing the contract, M. procured an advancement of \$3,000 to R., which it was agreed should be repaid before R. should be entitled to a conveyance; but before such amount was paid, and while M.'s houses were subject to mechanics' liens, R. conveyed one of the houses to A. Held, that though the mechanics' liens could not be enforced against A.'s house, because he was not sued within the time prescribed by law, it was nevertheless liable for any balance remaining after application of the proceeds of the other houses and lots to be conveyed to R. to the payment of the \$3,000 loan and the mechanics' liens on M.'s houses.

LASKEY v. BURRILL et al.

June 14, 1906.

[54 S. E. 23.]

1. Appeal—Petition—Assignment of Error—Sufficiency.—On appeal from a decree dismissing a cause on refusing leave to file an amended bill to conform with the proof, appellant gave a history of the proceedings, the substance of the allegations in the original bill and of the amended bill, and all the evidence, and alleged that there was no variance, and that no such case was sought to be set up by the amendment that equity was justified in refusing to permit the amendment and dismiss the suit. Held, that the assignment of error was to the refusal of the court to permit the filing of the amended bill, and was sufficiently specific within Code 1904, § 3464, providing that a petition for an appeal shall assign errors.

2. Partnership—Suit for Settlement—Pleadings—Evidence.—Where, in a suit for the settlement of partnership accounts, the question was whether complainant had been induced to accept a specified sum in full of his interest in the partnership assets by reason of representations made by a copartner that the statement on which the settlement was based was correct when he knew that it was not, it was immaterial whether the statement forming the basis of the settlement when the sum was paid was on a separate paper as the allegations of the original bill indicated or was in one of the books of the partnership as the amended bill alleged.

3. Equity—Pleadings—Bill—Amendment to Conform to Proof.—Amendment to bills to conform the pleadings to the proof are freely permitted, when promptly made after the necessity arises and before final decree.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 547.]

4. Same—Sworn Bill.—Where, in a suit for the settlement of partnership accounts, complainants before the rendition of a final decree

asked leave to file an amended bill so as to make the pleadings conform to the proof, and the difference between the amended bill and the original bill was so slight that no change in issues directed was necessary, it was error to refuse leave to file the amended bill, though the original bill was sworn to.

[Ed. Note.—For cases in point, see vol. 19, Cent. Dig. Equity, § 557.]

AMERICAN LOCOMOTIVE CO. et al. v. HOFFMAN.

June 14, 1906.

[54 S. E. 25.]

1. Writ of Error—Assignments of Error—Assignment Made in Reply Brief—Review.—Under Code 1904, § 3464, providing that a petition for a writ of error shall assign errors, assignments made in the reply brief will not be considered.

[Ed. Note.—For cases in point, see vol. 3, Cent. Dig. Appeal and Error, § 3097.]

2. Waters and Water Courses—Injuries by Flowage—Liability—Instructions.—Where, in an action for overflowing land in consequence of the obstruction of a stream by the construction of a fence and gate across the stream and culverts therein, the evidence showed that the overflow occurred by reason of an unusual rainfall and the breaking of a dam and the outpour of a reservoir of water into the stream, an instruction that it was the duty of defendant, in building the fence and water gate and the culverts, to so build them as not to obstruct such extraordinary flows of water as it might reasonably expect would occasionally flow down the stream, and that, if the damage was caused by a volume of water so great that no reasonably prudent man would have been expected to foresee it, defendant was not liable, whether the culverts and fence and water gate were defective, was misleading, as imposing on defendant a higher degree of care in the construction of the culverts and the fence and water gate than the law imposes.

3. Same—Injuries by Flowage.—A person constructing a fence and gate across a stream and culverts in the stream in such a manner as not to obstruct the natural flow of the water, including the usual high water, is not liable for injuries to land caused by throwing back the water and overflowing land, and such structures need not be constructed in such a manner as to permit the unobstructed flow of water in times of unprecedented and extraordinary freshets.

4. Same.—A person building a fence and gate across a stream and constructing culverts therein is not liable for the overflow of water caused by the breaking of a reservoir or dam over which he had no control, or by an unprecedented downpour of rain precipitating into the stream a flood not reasonably anticipated.

5. Same—Instructions.—Where, in an action for overflowing land